

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Kevin Vargas, :
Plaintiff, :
 :
v. : File No. 1:07-CV-84
 :
Bennington, Vermont Police :
Department, Vermont Drug :
Task Force, et at., :
Defendants. :

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
(Papers 5, 9 and 10)

Plaintiff Kevin Vargas, a Vermont inmate proceeding *pro se*, brings this action alleging violations of his Fourth Amendment rights. Specifically, Vargas claims that the defendants obtained evidence that was outside the scope of their warrant and that this evidence was used to obtain a state court conviction. Vargas now moves to dismiss his complaint voluntarily. Citing Heck v. Humphrey, 512 U.S. 477 (1994), Vargas notes in his motion that he is "still pursuing State post-conviction remedies to reverse his criminal convictions in reference to this matter." The motion is unopposed.

Federal Rule of Civil Procedure 41(a)(1) allows a plaintiff to dismiss an action without a court order by filing a notice of dismissal "at any time before service

by the adverse party of an answer or of a motion for summary judgment." In this case, defendant Vermont Drug Task Force has filed a motion to dismiss. No answers or motions for summary judgment have been filed. Courts generally do not consider "other filings, such as Defendant's motion to dismiss, to serve the equivalent of answers or summary judgment motions that would prevent plaintiffs from voluntarily dismissing their cases; to do so would be to require the courts to intervene frequently, which would no longer make Rule 41(a)(1)(i) dismissals self-executing, as they were intended to be." Medina v. Pataki, 2007 WL 1577755, at *2 (N.D.N.Y. May 31, 2007). Accordingly, I recommend that the Court construe Vargas's filing (Paper 10) as a notice of dismissal, and that this case be DISMISSED without prejudice. I further recommend that all other pending motions (Papers 5 and 9) be DENIED as moot.

Dated at Burlington, in the District of Vermont,
this 26th day of September, 2007.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).